

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION**

Civil Action No: 4:24-cv-00051-M-RN

CYNTHIA B. AVENS,

Plaintiff,

v.

FARIS C. DIXON, JR., DISTRICT
ATTORNEY, PITT COUNTY
MEMORIAL HOSPITAL, INC.,
DR. KAREN KELLY, MEDICAL
EXAMINER, JOHN/JANE DOE,
JOHN/JANE DOE,

Defendants.

**DR. KAREN KELLY'S
MOTION TO DISMISS
THE AMENDED COMPLAINT**

**Fed. R. Civ. P. 12(b)(1), 12(b)(2)
& 12(b)(6)**

NOW COMES Defendant, Karen Kelly, M.D., pursuant to Rule 12(b)(1) 12(b)(2), and 12(b)(6) of the Federal Rules of Civil Procedure, and respectfully moves the Court to dismiss the Amended Complaint, with prejudice, due to lack of jurisdiction over the subject matter of Plaintiff's claims, lack of personal jurisdiction, and failure to state a claim upon which relief may be granted. In support of this Motion, Dr. Kelly shows the Court as follows:

1. Plaintiff asserts claims against Dr. Kelly alleging violation of her civil rights under 42 U.S.C. §§ 1981, 1983, 1985, 1988, and 2000d.

2. Eleventh Amendment immunity and sovereign immunity bar Plaintiff's claims under §§ 1981 and 1983 against Dr. Kelly in her official capacity and the Court lacks subject matter and/or personal jurisdiction.

3. Qualified immunity bars Plaintiff's claims under §§ 1981 and 1983 against Dr. Kelly in her individual capacity and the Court lacks subject matter and/or personal jurisdiction.

4. Plaintiff's claims under §§ 1981 and 1983 fail because she has not plausibly alleged a violation of a federal law or constitutional right.

5. Plaintiff has failed to sufficiently plead the essential elements of a claim under § 1985 including intentional engagement in a conspiracy, an overt act in furtherance of a conspiracy, invidious discriminatory intent, deprivation of equal enjoyment of rights, or resulting injury.

6. Plaintiff has failed to sufficiently plead the essential elements of a discrimination claim under Title VI (§ 2000d), including intentional discrimination, denied access to participation in a program or activity receiving Federal financial assistance, or disparate treatment.

7. Plaintiff has failed to sufficiently plead the essential elements of State law claims for obstruction of justice or conspiracy to obstruct justice, including intent to obstruct justice, acts which impede or hinder public or legal justice, or an agreement with others to obstruct justice.

8. Plaintiff has failed to sufficiently plead facts that establish a claim of negligence *per se* against Dr. Kelly including the existence of subject matter jurisdiction over such a claim in this Court, the existence of a duty created by statute owed to Plaintiff, a breach of such a duty, and damages proximately caused by the said breach.

WHEREFORE, for the reasons set forth herein, and in the arguments and legal authorities set forth in Dr. Kelly's Memorandum in Support of her Motion to Dismiss the Amended Complaint (DE 47), Dr. Kelly respectfully requests the Court to grant her Motion to Dismiss and that Plaintiff's Amended Complaint be dismissed in its entirety with prejudice.

This 16th day of July, 2024.

JOSHUA H. STEIN
Attorney General

/s/ Jeremy D. Lindsley

Jeremy D. Lindsley

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Attorney for Dr. Karen Kelly

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Motion to Dismiss the Amended Complaint with the Clerk of Court using the CM/ECF system which electronically sends notice of the filing to registered parties identified below and that I served the paper upon Plaintiff by email and by depositing a copy with the U.S. Postal Service in a plain, postage-paid envelope addressed to Plaintiff as follows:

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This 16th day of July, 2024.

/s/ Jeremy D. Lindsley
Jeremy D. Lindsley
Assistant Attorney General